Shahmi Anand B Shah V Balendran & Ors v Susilah Devi a/p S Vallipuram

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22–114 OF 2006
VT SINGHAM J
18 FEBRUARY 2010

Land Law — Indefeasibility of title and interests — Transfer of land — Land unequivocally transferred by deceased to defendant as gift under valid instrument of transfer — Whether there was evidence of transfer to defendant as mere trustee — Whether transferor could declare a trust after transfer completed — Whether defendant's title indefeasible

Trusts and Trustees — Land — Whether trust created over land — Land unequivocally transferred by deceased to defendant as gift under valid instrument of transfer — Whether defendant held land on trust for plaintiff — Whether insufficient evidence to establish trust

Trusts and Trustees — Resulting trust — Whether sufficient evidence of intention to create resulting trust — Land unequivocally transferred by deceased to defendant as gift under valid instrument of transfer — Whether resulting trust pleaded — Whether evidence of resulting trust tendered

Trusts and Trustees — Trusts — Declaration — Trust may be created in writing or orally — Whether intention to create trust to be clearly shown

The third plaintiff's claim against the defendant was that, the land held under GM 6178 Lot 11499, Mukim Kuala Kuantan, Daerah Kuantan ('the said land') which was registered in the defendant's name was held by the defendant on trust for the third plaintiff ('the plaintiff'). The defendant denied the plaintiff's claim and pleaded that the said land was transferred to her by her deceased brother, Dato' Ahmad Shah Balendran bin Abdullah as a gift, in consideration of the defendant's contribution and support to the deceased during his lifetime. The plaintiff's uncle ('PW1') produced a letter dated 3 January 2001 (P2) which was signed by the deceased prior to his death as purported evidence that the said land was to be held on trust by the defendant for the plaintiff. The issue arising for determination was whether

A the said land which had been transferred to the defendant was held in trust for the plaintiff.

Held, dismissing the plaintiff's claim with costs:

B (1) The transfer of the said land was executed by the deceased (transferor) in favour of the defendant (transferee) as per the Transfer Form 14A of the National Land Code. The evidence of the Form 14A and PW2 (the lawyer who prepared the Form 14A) contradicted the plaintiff's case that the said land was transferred to the defendant to be held on trust C for the plaintiff (see para 5(a) & (b)).

(2) The deceased had done everything he could to divest himself of the title in favour of the defendant absolutely and the title to the said land was indefeasible. There was insufficient evidence to find otherwise or to find D for the plaintiff (see para 6(a)).

(3) The Form 14A was executed in favour of the defendant on 16 December 1993, about seven years before the plaintiff wrote the letter (P2) on 3 January 2001. Therefore, the deceased did not own the said land at the time when he wrote the letter (P2) as the same had already E been transferred and registered in the defendant's name about seven years ago. Further a proper reading of the letter (P2) did not show that the deceased had intended the said land to be held by the defendant on trust for the plaintiff (see paras 6(c) & 7).

F (4) The evidence of PW5 (a senior member of the BAR) that 'the members of the Kuantan Club and the whole town knew that the said land was for the plaintiff' could not be given any weight as the source of this information had never been identified and it was hearsay. PW5's evidence had to be looked at with great care and approached with G suspicion since the plaintiff and her witnesses had no fear of contradiction by a dead man (see para 10).

(5) A trust need not necessarily be in writing but could be oral. Nevertheless, what is important is that, the express words or intention H must be made clear that the intention of the deceased was to create a trust and that the transfer of the land to any third party was executed to be held in trust for the named beneficiary. The deceased being a lawyer and not a layman had executed Form 14A in favour of the defendant and it was an unequivocal transfer of the said land and this I was confirmed by PW2 (see paras 13–14).

(6) There was no evidence led on behalf of the plaintiff of a resulting trust and it was not the plaintiff's pleaded case or an issue for trial. The plaintiff was therefore not entitled in law to depart from her pleaded case. There was no evidence of a resulting trust (see para 19).

[Bahasa Malaysia summary

Tuntutan plaintif ketiga terhadap defendan adalah bahawa tanah yang dipegang di bawah hakmilik GM 6178 Lot 11499, Mukim Kuala Kuantan, Daerah Kuantan ('tanah tersebut') yang mana telah didaftarkan atas nama defendan dipegang oleh defendan atas amanah bagi pihak plaintif ketiga ('plaintif'). Defendan telah menafikan tuntutan plaintif dan memplid bahawa tanah tersebut telah dipindahmilik kepadanya oleh abangnya yang telah meninggal dunia ('si mati'), Dato' Ahmad Shah Balendran bin Abdullah sebagai hadiah, dengan mengambilkira sumbangan dan sokongan defendan terhadap si mati semasa hayatnya. Bapa saudara plaintif ('PW1') telah mengemukakan sepucuk surat bertarikh 3 Januari 2001 (P2) yang ditandatangani oleh si mati sebelum kematiannya yang berupa keterangan bahawa tanah tersebut telah dipegang sebagai amanah oleh defendan untuk plaintif. Isu yang timbul untuk penentuan adalah sama ada tanah tersebut yang dipindah milik kepada defendan dipegang sebagai amanah untuk plaintif.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Pindah milik tanah tersebut telah disempurnakan oleh si mati (pemberi pindah milik) atas nama defendan (penerima pindah milik) mengikut Borang Pindah milik 14A Kanun Tanah Negara. Keterangan daripada Borang 14A dan PW2 (peguam yang menyediakan Borang 14A tersebut) bercanggah dengan kes plaintif iaitu tanah tersebut telah dipindah milik kepada defendan untuk dipegang sebagai amanah untuk plaintif (lihat perenggan 5(a) & (b)).

(2) Si mati telah melakukan segala yang termampu untuk melucutkan dirinya daripada hakmilik tanah tersebut untuk diberikan kepada defendan sepenuhnya dan hakmilik tanah tersebut adalah hakmilik tak boleh sangkal. Keterangan tidak mencukupi untuk menunjukkan sebaliknya atau untuk memihak kepada plaintif (lihat perenggan 6(a))

(3) Borang 14A tersebut telah disempurnakan atas nama defendan pada 16 Disember 1993, kira-kira tujuh tahun sebelum plaintif menulis surat tersebut (P2) pada 3 Januari 2001. Oleh itu, si mati tidak memiliki tanah tersebut semasa surat itu ditulis (P2) oleh sebab tanah tersebut telah dipindahmilik dan didaftarkan atas nama defendan kira-kira tujuh tahun dahulu. Selanjutnya, pembacaan sebenar surat tersebut (P2) tidak menunjukkan si mati berhasrat bagi tanah tersebut untuk dipegang oleh defendan sebagai amanah untuk plaintif (lihat perenggan 6(c) & 7).

(4) Keterangan oleh PW5 (seorang ahli kanan Majlis Peguam) bahawa 'the members of the Kuantan Club and the whole town knew that the said land was for the plaintiff' tidak boleh diberi pertimbangan kerana sumber bagi maklumat tersebut tidak pernah dikenalpasti dan

merupakan keterangan dengar cakap. Keterangan PW5 hendaklah dinilai dengan amat berhati-hati dan dengan pendekatan syak wasangka memandangkan plaintif dan saksi-saksinya tidak perlu khuatir dengan penyangkalan oleh seorang yang telah mati (lihat perenggan 10).

(5) Suatu amanah tidak semestinya dibuat secara bertulis tetapi boleh juga secara lisan. Walau bagaimanapun, apa yang penting ialah perkataan-perkataan atau niat hendaklah jelas menunjukkan hasrat si mati untuk mewujudkan suatu amanah dan bahawa pindahmilik tanah tersebut kepada mana-mana pihak ketiga telah disempurnakan untuk dipegang sebagai amanah bagi benifisiari yang dinamakan. Si mati, yang merupakan seorang peguam dan bukan orang biasa telah menyempurnakan Borang 14A atas nama defendan dan merupakan satu pindahmilik yang jelas dan disahkan oleh PW2 (lihat perenggan 13–14).

(6) Tiada keterangan diberikan bagi pihak plaintif berkaitan dengan suatu amanah berbangkit dan ianya bukanlah kes plaintif yang diplid atau satu isu untuk dibicarakan. Plaintif oleh itu tidak berhak dari segi undang-undang untuk menyimpang daripada kes yang diplidkannya. Tiada apa-apa keterangan berkaitan satu amanah berbangkit (lihat perenggan 19).]

Notes

For a case on whether sufficient evidence of intention to create resulting trust, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2478.

For cases on declaration of trusts, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2593–2595.

For cases on indefeasibility of title and interests in general, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3032–3159.

For cases on land in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2357–2379.

Cases referred to

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (folld)

Berry v British Transport Commission [1961] 3 All ER 65, CA (folld)

Blay v Pollard And Morris [1930] 1 KB 628, CA (folld)

Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152, HL (folld)

Chua Cheow Tien v Chua Geok Eng & Anor [1968] 2 MLJ 180, HC (refd)

Endacott, Deed Cope, In re v Endacott [1960] Ch 232, CA (refd)

ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422; [2004] 4 CLJ 674, CA (folld)

Farrell v Secretary of State for Defence [1980] 1 All ER 166, HL (folld)

Grant v Grant (1865) 55 ER 776 (folld)

Haji Mohamed Dom v Sakiman [1956] MLJ 45, CA (folld)

Heng Gek Kiau v Goh Koon Suan [2007] 6 CLJ 626, CA (folld)
How Paik Too v Mohideen [1968] 1 MLJ 51, FC (folld)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (folld)
Jones v Great Westerns Railways (1930) 144 LT 194, HL (folld)
Kolb's Will Trusts, In re [1962] Ch 531, Ch D (refd)
Leong Hoong Khie v PP and another case [1986] CLJ (Rep) 179, FC (refd)
Lim Ah Oh & Anor v Rex [1950] MLJ 269 (refd)
Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene [1995] 1 MLJ 115, HC (refd)
Loo Hon Kong v Loo Kim Lim [2004] 4 CLJ 1, CA (folld)
Nanwa Gold Mines Ltd, Re; Ballantyne v Nanwa Gold Mines Ltd & Anor [1955] 3 All ER 219, Ch D (refd)
Natesan v Goh Gok Hoon [1968] 2 MLJ 3, FC (folld)
Palaniappa Chettiar v Arunasalam Chettiar [1962] MLJ 143, PC (refd)
Paul v Constance [1977] 1 All ER 195, CA (refd)
Pearce v Pearce [1960] 3 All ER 21, CA (refd)
Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97; [2005] 4 CLJ 750, CA (refd)
Quah Eng Hock v Ang Hooi Kiam (f) [1999] MLJU 481; [2000] 2 AMR 2300, HC (refd)
Shephard & Anor v Cartright & Ors [1955] AC 431, HL (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Tan Ying Hong v Tan Sian San & Ors (FC) Civil Appeal No 02(f)-19 of 2009(c) (refd)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7, FC (refd)
Teh Eok Kee & Anor v Tan Chiah Hock & Anor [1995] 3 MLJ 613, SC (refd)
Teoh Heng Seng & Ors v Teoh Kiew Seng & Anor [2000] 1 MLJ 707; [2001] CLJ 598, HC (refd)
Teoh Heng Seng & Ors v Teoh Kiew Seng & Anor [2005] 3 CLJ 15, CA (folld)
Thomas v Times Book Co Ltd [1966] 1 WLR 911, Ch D (refd)
TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin [2006] 5 MLJ 217; [2006] 3 CLJ 616, CA (refd)
Wan Naimah v Wan Mohamad Nawawai [1974] 1 MLJ 41, FC (folld)
Warren v Gurney & Anor [1944] 2 All ER 472, CA
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, HL (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614; [1994] 2 AMR 28, SC (refd)
Yew Phaik Hoon v Quah Ooi Keat & Anor [1969] 1 MLJ 32, PC (refd)
Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182, FC (refd)

Legislation referred to

Evidence Act 1950 s 154
National Land Code s 340, 340(2), Form 14A

Vigneshkumar Krishnansamy (Balendran Chong) for the plaintiffs.
Brendan Siva (Aida Haryani with him) (Kadir Andri & Partners) for the defendant.

VT Singham J:

[1] The third plaintiff's claim against the defendant is that, the land held under GM 6178 Lot 11499, Mukim Kuala Kuantan, Daerah Kuantan hereinafter referred to as 'the said land' which is registered in the defendant's name is held by the defendant on trust for the third plaintiff. In this judgment, the third plaintiff will be referred to as 'the plaintiff' as the first and second plaintiffs are not proceeding with their alleged claim. On the other hand, the defendant denies the plaintiff's claim and has pleaded that the said land was transferred to her by her deceased brother, Dato' Ahmad Shah Balendran bin Abdullah as a gift, in consideration of the defendant's contribution and support to the deceased during his lifetime.

[2] By the statement of claim the plaintiff claims for herself the following reliefs:

(a) Hakmilik hartanah yang dikenali sebagai GM 6178 Lot 11499 Mukim Kuala Kuantan Negeri Pahang Darul Makmur ('hartanah tersebut') adalah dipegang oleh defendan sebagai pemegang amanah bagi pihak plaintif ketiga di bawah satu amanah;

(b) Plaintif ketiga mempunyai hak 'beneficial' ke atas hakmilik yang dikenali sebagai GM 6178 Lot 11499 Mukim Kuala Kuantan Negeri Pahang Darul Makmur;

(c) Hakmilik defendan atas tanah yang dikenali sebagai GM 6178 Lot 11499 Mukim Kuala Kuantan Negeri Pahang Darul Makmur dipindahmilik dan didaftarkan atas nama plaintif ketiga;

(d) Defendan menandatangani suratcara pindahmilik serta segala dokumen yang perlu untuk memindahmilik kesemua bahagian haknya ke atas hartanah tersebut kepada plaintif ketiga dalam tempoh sebulan daripada tarikh penghakiman dan sekiranya defendan gagal mematuhinya, timbalan pendaftar mahkamah yang mulia ini diberi kuasa untuk menandatangani suratcara pindahmilik dan segala dokumen yang perlu bagi pihak defendan untuk memindahmilik kesemua bahagian hak defendan ke atas hartanah tersebut kepada plaintif ketiga.

[3] At the commencement of the trial both parties had agreed that the only issue to be decided by this court is, whether the said land which has been

transferred to the defendant is held in trust for the plaintiff. The plaintiff's counsel has also informed this court that only the plaintiff is proceeding with the claim and the claim is only in respect of the said land.

[4] As agreed, the only issues for determination by this court is, No 2 and No 3 of I*su-Isu untuk Dibicarakan* (IUB) (encl 13) which are as follows:

2. Sama ada hartanah yang dikenali sebagai GM 6178 Lot 11499 Mukim Kuala Kuantan, Daerah Kuantan, Negeri Pahang Darul Makmur (Hartanah tersebut) adalah dipegang oleh Defendan atas dasar persefahaman sebagai pemegang amanah bagi Plaintif Ketiga.

(a) Selanjutnya, sama ada pindahmilik tersebut dibuat berdasarkan persefahaman yang tersebut di atas kerana kononnya Allahyarham Dato' Ahmad Shah Balendran Bin Abdullah pada ketika itu menghadapi masalah perkahwinan dan Plaintif Ketiga juga pada masa itu masih di bawah umur;

(b) Sama ada hartanah tersebut seharusnya dipindahmilik dan didaftarkan kepada Plaintif Ketiga.

3. Sama ada hartanah tersebut telah diberikan oleh Allahyarham Dato' Ahmad Shah Balendran Bin Abdullah kepada Defendan pada tahun 1993/1994 sebagai pemberian mutlak (absolute gift) oleh kerana sumbangan Defendan kepada keluarga mereka atas dasar saling kasih sayang (mutual love and affection).

[5] Having gone through the evidence both oral and documentary, and upon considering the submission of both parties with their authorities, the findings of this court is as follows:

(a) The fact that the transfer of the said land was executed by the deceased (transferor) in favour of the defendant (transferee) as per the Transfer Form 14A of the National Land Code (NLC) is not denied as that evidence of the transfer of the said land in favour of the defendant was produced on behalf of the plaintiff and marked as P5(A-D).

(b) The lawyer who prepared the said transfer document Form 14A and attested the same was called as the plaintiff's witness and he has confirmed the same. There is no issue raised on the transfer of document on behalf of the plaintiff through this witness. In fact there is not a single question put to PW2 with the view to show any illegality of the transaction or that the transfer from the deceased to the defendant as shown in P5(A-D) was not the true position of the transaction (see s 154 of the Evidence Act 1950). In fact the evidence of the Transfer Form 14A, P5(A-D) and PW2's evidence, did not support the plaintiff's case. Both the oral and documentary evidence

produced through PW2 and P5(A-D) has contradicted plaintiff's own case that the said land was transferred to the defendant to be held on trust for the plaintiff.

(c) Therefore, the plaintiff or her counsel cannot be allowed to approbate or reprobate at the same time on the stand taken by them.

(d) The function of this court is to ascertain the truth of the case put forward by both parties and the decision can only be based on the evidence and the application of the principles of law.

(e) The gift, being the said land, as contended on behalf of the defendant had in fact been perfected and is legally registered in the defendant's name since 8 February 1994. The defendant continues to live on the said land as she is the registered owner of the said land and the title is indefeasible (see s 340 of the National Land Code) ('NLC').

[6] The only issue therefore before this court is, whether the transfer of the said land by the deceased to the defendant was to be held on trust for the plaintiff and whether the plaintiff could claim title to the said land.

(a) This court finds the deceased has done everything he could to divest himself of the title in favour of the defendant absolutely and the title to the said land is indefeasible (see s 340 of the NLC). There is insufficient evidence to find otherwise or to find for the plaintiff.

(b) The title which is registered in the defendant's name is indefeasible and this court is unable to dislodge the title as there is no evidence of any vitiating factors as laid down in sub-s (2) of s 340 of the NLC (see *Quah Eng Hock v Ang Hooi Kiam (f)* [1999] MLJU 481; [2000] 2 AMR 2300 at p 2309; *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7).

(c) The evidence of the plaintiff's uncle ('PW1') who produced a letter dated 3 January 2001 (P2) which was signed by the deceased prior to his death did not support the plaintiff's case that the said land is to be held on trust by the defendant for the plaintiff. It is to be noted that the Transfer Form 14A which was executed in favour of the defendant was done on 16 December 1993 (see P5(A-D)) about seven years before the plaintiff wrote this letter (P2) on 3 January 2001. Therefore, the deceased did not own the said land at the time when he wrote this letter (P2) as the same had already been transferred and registered in the defendant's name about seven years ago.

[7] Based on the totality of the evidence, this court cannot read words into the said letter (P2) to suit the plaintiff's case that the said land is held by the defendant on trust for the plaintiff. As stated above, at the time when this letter was written by the deceased on 3 January 2001, the said land had

already been transferred and registered in the defendant's name as the registered owner since 8 February 1994. This court is of the respectful view that a proper reading of the contents of the said letter (P2) did not show that the plaintiff's deceased father had intended the said land which was registered in the defendant's name absolutely to be held by the defendant on trust for the plaintiff. Therefore, the phrase 'any property' referred to in P2 could not have referred to the said land which was no longer owned by the deceased at the time. The language used in the said letter (P2) by the deceased, a senior member of the BAR at the time would not be reasonably understood as conveying any intimation that the deceased had intended or had referred to the said land or that the said land was to be held in trust for the plaintiff. For the purpose of clarity and easy reference, it may be useful to set out the relevant passage of the said letter (P2) which the plaintiff seemed to have relied that the deceased had intended the said land to be given to the plaintiff which is as follows:

> If Mishah is sent to boarding — I wash my hands of all 3 children they will not be my responsibility socially or financially. If compelled — I will pay maintenance for minor children — not boarding. My property, if any, will go to charity.

[8] Accordingly, it is not reasonable for learned counsel for the plaintiff or the plaintiff to contend or to act merely on the said letter or even upon taking into consideration the evidence of PW1, PW2, PW3, PW4, PW5 and the plaintiff, (PW6) without any further positive evidence to support the plaintiff's claim.

[9] This court finds that even on plaintiff's own evidence, the deceased did not inform her that the said land had been transferred to the defendant on trust for her and she has no personal knowledge of the reason why the deceased had transferred the said land to the defendant. Surely the plaintiff must be aware and know the meaning of the word 'trust for her' when she testified under cross-examination that the deceased did not inform her that the said land had been transferred to the defendant on trust for her. It is to be noted that when question No 25 in P13 (encl 41) was put to the plaintiff under examination-in-chief, the plaintiff understood the word trust for her and had replied that the deceased never told her that the defendant was supposed to hold the said land on trust for her.

[10] It is regrettable and with respect that whatever evidence that is produced through Dato' Ariff Mahindar bin Abdullah ('PW5') did not assist to support the plaintiff's claim as pleaded. As a senior member of the BAR, PW5 must surely know that his evidence that 'the members of the Kuantan Club and the whole town knew that the said land was for the plaintiff' cannot be considered or given any weight as the source of this information

had never been identified and it is hearsay. PW5's evidence with respect, has to be looked at with great care and approached with suspicion since the plaintiff and her witnesses have no fear of contradiction by a dead man (see *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182 at p 192; *Thomas v Times Book Co Ltd* [1966] 1 WLR 911 at pp 915–916). In fact when PW5 replied in answer to a question posed by learned counsel for the defendant who 'the numerous witnesses' he had referred to in P11 (pp 42–44 of the IDP), PW5 said he did not have the names. In addition, this court finds that PW5 did not even state in his letter dated 27 June 2001 (P11) to the defendant's previous solicitors that one of the 'numerous witnesses' that he had mentioned included himself or of the alleged conversation he supposedly had with the deceased. In any event, even if the whole world says that the said land was for the plaintiff, the deceased himself must clearly state that the said land which was transferred to the defendant was to be held in trust for the plaintiff but there is no such evidence produced by the plaintiff.

[11] On the other hand, if the deceased was serious in his intention to give the said land to the plaintiff or if he was in doubt as to whether a trust could be valid under the Islamic law as testified by PW5, surely the deceased would have known that the proper authority to be consulted would be the Jabatan Agama Islam and not PW5 as there is no evidence that PW5 is an expert in Islamic law. Further, if ever there was such a conversation which had taken place between the deceased and PW5 as alleged and which was challenged by the defence, surely PW5 would have mentioned it in his letter P11 which obviously cast doubt on the alleged conversation he had with the deceased. In any event, nothing materialised in favour of the plaintiff after the alleged conversation. In *TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin* [2006] 5 MLJ 217; [2006] 3 CLJ 616, the Court of Appeal held that a trust deed and transfer of the land by the deceased, a Muslim to himself as trustee for the benefit of his son who was then eight years old at the time was valid even though physical possession of the land was never given to the son during the lifetime of the deceased. The Court of Appeal had further held at p 625:

> However, in the instant case, the applicability of Islamic law is subject to the civil law which are applicable to all irrespective of whether the parties are Muslims and non-Muslims. And here there are no preserving rules of Islamic law in the applicable land law and the law of trust that govern this case.

[12] In the circumstances and taking into account the surrounding circumstances, this court finds that PW5's evidence did not support the plaintiff's claim of a trust having being created by the deceased in the plaintiff's favour and that the said land was to be held on trust for her as alleged. Mere intention to give the said land to the plaintiff would not be

conclusive, unless it is shown that the said land which has really been given or transferred to the defendant was to be held on trust for the plaintiff. Unfortunately, there is no such evidence and the documentary evidence produced on behalf of the plaintiff does not support the plaintiff's claim (see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 629).

[13] This court is mindful that the trust need not necessarily be in writing but could be oral. Nevertheless, what is important is that, the express words or intention must be made clear that the intention of the deceased was to create a trust and that the transfer of the land to any third party was executed to be held in trust for the named beneficiary. In *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41, Suffian CJ (later Lord President of the Federal Court) held the law to be that, a declaration of trust may be made quite informally provided that the words used are clear and unequivocal and referred to *Grant v Grant* (1865) 55 ER 776 where Romilly MR said words declaring a trust at p 777:

> need not be in writing … They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, 'I hold the property in trust for you,' nor it is necessary to say, 'I hold the same for your separate use'. Any words that the donor meant, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of showing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created.

[14] Be that as it may, 'my property' if any even for the sake of argument must surely refer to any property which the deceased had owned at the material time on 3 January 2001. The deceased could not have referred to the said land which was not owned by him and where in fact had been transferred to the defendant and registered in her name absolutely about seven years ago on 8 February 1994 unless the said land was specifically described in P2. At this stage, it is important to note that the deceased being a senior member of the BAR which is not denied, if he had any intention or at all to give the said land to the plaintiff, he could have reduced into writing or at least said in clear terms to the effect that the said land was transferred to the defendant to be held in trust for the plaintiff. Alternatively, the deceased could have also transferred the said land to himself as trustee for the plaintiff as the same is recognised and valid under the Islamic law. Unfortunately, there was no explanation or any satisfactory explanation why the alleged trust was not reduced into writing or transferred to the deceased as trustee for the plaintiff except for the bare evidence produced by PW3, PW4, PW5 and PW6 that the deceased had said that the house is for the plaintiff and that members of

A the Kuantan Club and the whole town knew that the said land was for the plaintiff as testified by PW5. The deceased being a lawyer and not a layman had executed Form 14A (exh P5(A-D)) in favour of the defendant and it was an unequivocal transfer of the said land and this is confirmed by PW2.

B

[15] However, this court finds that, in *Wan Naimah v Wan Mohamad Nawawai*, the facts and the documentary evidence produced in favour of the plaintiff are much stronger and compelling for the court to find for the plaintiff. In fact the contents of exh A in that case which was executed on 1 January 1961 are poles apart compared to the contents of P2 produced on behalf of the plaintiff in the instant case which the plaintiff is relying to support her claim that when the deceased referred to 'any property' in P2, he had included the said land. This court is unable to agree with the contention on behalf of the plaintiff that 'any property' referred to in para 5 of P2 included the said land or the contents P2 had any relevance to the plaintiff's claim in respect of the said land.

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[16] On the other hand, this court agrees with the contention of learned counsel for the defendant that the contents of P2 when read in its totality refers to the mode and conditions of financial contribution to the deceased's children and their education which included the plaintiff. There is nothing in the said letter P2 or materials produced for this court to draw any inference that the contents of P2 was intended to create a trust in favour of the plaintiff in respect of the said land unlike in the case of *Wan Naimah v Wan Mohamad Nawawai* where the words were clear and the defendant himself had signed the document exh A. In that case, the document exh A clearly supports the plaintiff's oral evidence and the evidence of other witnesses that the deceased had in fact created a trust in respect of 1/2 share in the subject matter of the land where the defendant himself had signed exh A and accepted the same (see *Heng Geck Kiau v Goh Koon Suan* [2007] 6 CLJ 626).

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[17] This court wishes to make it clear that this court cannot either in law or on the facts be expected to stretch the facts to such an extent so as to give effect to the plaintiff's claim when there are insufficient materials to support the alleged claim. Principles of morality has no place in this suit nor can it be applied as a substitute to defease the title to the said land as the same is registered in the defendant's name absolutely unless there are positive and compelling evidence for the court to make such findings. Therefore, the question of depriving the deceased's own children in giving them nothing as contended on behalf of the plaintiff is not a consideration in law or on the facts so as to defease the title of the defendant as the registered owner of the said land (see *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97; [2005] 4 CLJ 750 at p 764; *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422; [2004] 4 CLJ 674

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at pp 684–687; *Teoh Heng Seng & Ors v Teoh Kiew Seng & Anor* [2000] 1 MLJ 707; [2001] CLJ 598 (HC) and confirmed by the Court of Appeal in *Teoh Heng Seng & Ors v Teoh Kiew Seng & Anor* [2005] 3 CLJ 15 (CA)).

[18] In any event, for the sake of completeness, this court finds there is no resulting trust and no evidence have been produced to support the desperate attempt of an alleged resulting trust as raised in the submissions of learned counsel for the plaintiff and neither was it pleaded in the statement of claim or raised as an issue to be determined by this court as agreed between the parties as contained in IUB (encl 13) or the application made to amend the pleadings. Learned counsel for the plaintiff with respect, has now set out a case of an alleged resulting trust which is not only is not founded upon, but contrary to the plaintiff's own pleadings. There was not even any application for any amendment of the statement of claim pleaded.

In *Blay v Pollard And Morris* [1930] 1 KB 628, Scrutton LJ said at p 634:

> cases must be decided on the issues on the record; and if it is desired to raise other issues there must be placed on the record by amendment.

[19] As stated above, there is no evidence led on behalf of the plaintiff of a resulting trust and it was not the plaintiff's pleaded case or an issue for trial. The plaintiff is therefore not entitled in law to depart from her pleaded case (see *Haji Mohamed Dom v Sakiman* [1956] MLJ 45; *How Paik Too v Mohideen* [1968] 1 MLJ 51 at p 52; *Natesan v Goh Gok Hoon* [1968] 2 MLJ 3 at p 8; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615 at p 620; *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 at p 173; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 CLJ 667 at p 671, 673). This court finds there is no evidence of a resulting trust (see *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97; [2005] 4 CLJ 750 at pp 760–763; *Loo Hon Kong v Loo Kim Lim* [2004] CLJ 1).

[20] Further and as stated, this court finds the submission raised on behalf of the plaintiff is shown to be inconsistent with the pleadings and evidence and when compared with the documents and other compelling evidence which is self-contradiction with the evidence produced on behalf of the plaintiff, in particular, exh P5(A-D). The evidence of PW1 is also not supportive of the plaintiff's claim where he is not even aware of the transfer of the said land to the defendant on 16 December 1993. As for the evidence of PW3, it is also not supportive of the plaintiff's case where she said that the deceased did not tell her in so many words that he wanted to leave the house to the plaintiff. PW3 has also said that even if what she said is true, she has admitted that it is possible that the deceased had changed his mind after 1993

as to who should get the property. She has also admitted that she has no personal knowledge of the reason the deceased had transferred the said land to the defendant.

[21] As for the evidence of PW4, the plaintiff's mother, she admitted that when she asked for divorce, she had waived all the properties or assets whatever and she did not ask for anything. Therefore, the question of or theory that PW4 would interfere with the said land did not arise. PW4 has also said that the deceased is supposed to give the said land to the plaintiff but she did not know the terms to the trust. She also said that she did not know anything about the said land having been transferred to the defendant as trustee for the plaintiff. She had also no personal knowledge why the deceased had transferred the property to the defendant. She is also not aware of the contents of P2. Under re-examination, PW4 said that she is not sure about the terms of the trust and that a trust was to be created. All she knew was that the deceased was supposed to give the house to the plaintiff. On the facts, this court would not be wrong to say that the evidence produced by the plaintiff and the witnesses appear to be based on assumptions which are not supported by sufficient evidence (see *Berry v British Transport Commission* [1961] 3 All ER 65 at p 75).

[22] This court wishes to make it clear that this court cannot indulge in speculation as to why the deceased did not transfer the said land to himself as trustee for the plaintiff or to the defendant as trustee for the plaintiff after having found the plaintiff had failed to discharge the onus which lay on her to prove the claim against the defendant as pleaded in the statement of claim. Even assuming that this court had erred in its judgment, it is the considered view of this court that on the balance of probabilities which is the standard of proof in such cases, the onus of proof has not been discharged by the plaintiff. In any event, it would necessarily follow that the reasons advanced by the defendant should be accepted on the totality of the evidence as having rebutted the plaintiff's claim.

[23] This court finds that much of the evidence produced on behalf of the plaintiff are against the inherent probabilities and the contemporaneous documents. This court finds that it is incredible and inherently improbable that there would not be any written or formal document set up of this alleged trust by the deceased as claimed by the plaintiff if he truly intended to give the said land to the plaintiff. Admittedly, the deceased was a senior lawyer and having held 1/10 share as trustee for Krishnaraja a/l A Ramalingam and 2/10 share in his own name in another piece of land under *item No 2* and under asset at p 9 of the IDP (Lampiran B) and under trust property p 12 of item C of the grant of letters of administration, and a trustee of the Kuantan Rotary Charity Foundation for Edna Windsor Fund it cannot be denied that

the deceased was certainly familiar with the law of trust. All this materials would show that if the deceased truly had intended the said land to be given to the plaintiff, he could have easily made a trust deed or transferred the said land to himself as trustee for the plaintiff as was done in the case of the 1/10 share as trustee for Krishnaraja a/l A Ramalingam and in the other piece of land mentioned above.

[24] Alternatively, the least the deceased would not have failed to mention in clear words or terms in P2 his intention at the time if he had intended to give the said land to the plaintiff but nothing whatsoever was said by the deceased either in P2 or in P5(A-D). In the light of all the evidence, this court finds there is nothing to raise any or sufficient doubt in the court's mind as to the conclusion which this court has reached. On the other hand, even if P2 is meant for or as having included the said land when the deceased referred to 'any property' which this court is unable to draw such an inference, it is inherently improbable that at the same time the deceased did not disclose to PW1 that the said land which has been transferred to the defendant about seven years ago belong to the plaintiff or the same had been transferred to the defendant to be held on trust for the plaintiff if that was indeed the case. In fact and admittedly, PW1 was not even aware that the said land had been transferred to the defendant more than seven years before the letter dated 3 January 2001 (P2) was written by the deceased and handed to him. PW1 has further admitted that the deceased did not tell him at any time between 16 December 1993 (when the said land was transferred to the defendant) and 17 April 2001 (the date when the deceased died) that the deceased had transferred the said land to the defendant to be held on trust. Further, PW1 himself is not aware the deceased had told anyone at all that the said land had been transferred to the defendant in trust for the plaintiff.

[25] As for the defendant's case, she has clearly explained that the transfer of the said land was executed in her favour by the deceased as a gift for all the financial contribution and support she had be given to the deceased during his lifetime and that was the reason why there was no money paid to the deceased at the time of the execution of the transfer P5(A-D). In fact, as stated above, there was not a single question put to PW2 to contradict P5(A-D)or with the view to cast any doubt on the legality of the transfer instrument as being void which was raised only during submission as the question is permitted under s 154 of the Evidence Act 1950. Therefore, the plaintiff must accept the fate that the evidence produced on her behalf has not on the balance of probabilities established the claim filed against the defendant except for bare allegations. This court finds that the plaintiff has not adduced sufficient or positive evidence for this court to draw any such inference that the said land which was transferred by the deceased to the

defendant and registered in the defendant's name absolutely was to be held on trust for her. Inferences must be distinguished from conjectures or speculations.

In *Jones v Great Westerns Railways* (1930) 144 LT 194, Lord Macmillan said at p 202:

> An inference in the legal sense is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of proof.

In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 where Lord Wright said at pp 186–170:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[26] The fact that the deceased had given other properties to the defendant did not legally preclude the deceased from transferring the said land to the defendant absolutely as he is at liberty to do so. Consequently, the fact that the defendant has obtained other property or properties of the deceased did not disentitle her to keep the said land to herself as she is the legal and registered owner of the said land. The defendant did not state that there was no consideration for the transfer of the said land to her. All that she had said was that, she did not pay the sum as stated in the transfer form P5(A-D). However, she had raised in the statement of defence and said in her evidence that the deceased had transferred the said land to her for all the contribution and support she had given to the deceased during his lifetime. Therefore, it cannot be said that the transfer was without any consideration as first, consideration need not be by payment of cash and secondly, there is no allegation in the statement of claim to the effect that the transfer is void and thirdly, there is no relief prayed for the Transfer Form 14A P5(A-D) to be set aside for want of consideration and fourthly, the title is indefeasible and the plaintiff's claim does not fall under any of the exceptions as laid in sub-s (2) of s 340 of the NLC.

[27] The fact that the deceased had given other properties to the defendant did not legally preclude the deceased from transferring the said land to the defendant absolutely as he is at liberty to do so. Consequently, the fact that the defendant has obtained other property or properties of the deceased did not disentitle her to keep the said land to herself as she is the legal and registered owner of the said land. The defendant did not state that there was

no consideration for the transfer of the said land to her. All that she had said was that, she did not pay the sum as stated in the transfer form P5(A-D). However, she had raised in the statement of defence and said in her evidence that the deceased had transferred the said land to her for all the contribution and support she had given to the deceased during his lifetime. Therefore, it cannot be said that the transfer was without any consideration as *first*, consideration need not be by payment of cash and *secondly*, there is no allegation in the statement of claim to the effect that the transfer is void and *thirdly*, there is no relief prayed for the Transfer Form 14A P5(A-D) to be set aside for want of consideration and *fourthly*, the title is indefeasible and the plaintiff's claim does not fall under any of the exceptions as laid in sub-s (2) of s 340 of the NLC.

(a) *Paul v Constance* [1977] 1 All ER 195;

(b) *Wan Naimah v Mohamad Nawawai* [1974] 1 MLJ 41;

(c) *Lim Ah Oh & Anor v Rex* [1950] MLJ 269;

(d) *Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613;

(e) *In Re Endacott, Deed Cope v Endacott* [1960] 1 Ch 232;

(f) *Re Nanwa Gold Mines Ltd; Ballantyne v Nanwa Gold Mines Ltd & Anor* [1955] 3 All ER 219;

(g) *Quah Eng Hock v Ang Hooi Kiam (f)* [1999] MLJU 481; [2000] 2 AMR 2300;

(h) *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 2 AMR 28;

(i) *In Re Kolb's Will Trusts* [1962] Ch 531;

(j) *Chua Cheow Tien v Chua Geok Eng & Anor* [1968] 2 MLJ 180;

(k) *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115 (HC);

(l) *Shephard & Anor v Cartright & Ors* [1955] AC 431 (HL);

(m) *Warren v Gurney & Anor* [1944] 2 All ER 472;

(n) *Yew Phaik Hoon v Quah Ooi Keat & Anor* [1969] 1 MLJ 32;

(o) *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697;

(p) *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143;

(q) *Pearce v Pearce* [1960] 3 All ER 21; and

(r) *Tan Ying Hong v Tan Sian San & Ors* (FC) Civil Appeal No 02(f)-19 of 2009(c).

[28] Learned counsel for the defendant had referred to the following cases:

(a) *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97; [2005] 4 CLJ 750;

(b) *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422; [2004] 4 CLJ 674;

(c) *Teoh Heng Seng & Ors v Teoh Kiew Seng & Anor* [2005] 3 CLJ 15;

(d) *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41;

(e) *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182;

(f) *TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin* [2006] 5 MLJ 217; [2006] 3 CLJ 616;

(g) *Leong Hoong Khie v Public Prosecutor and another case* [1986] CLJ (Rep) 179;

(h) *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196;

(i) *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615;

(j) *Loo Hon Kong v Loo Kim Lim* [2004] 4 CLJ 1; and

(k) *Heng Gek Kiau v Goh Koon Suan* [2007] 6 CLJ 626.

[29] Cases referred to and relied on by learned counsel for the plaintiff in the respectful view of this court can be distinguished on the facts and circumstances of the instant case and does not assist the plaintiff to support her claim. The crux of the matter in the instant case is that, there is no positive or any sufficient evidence to support the plaintiff's claim that the said land was transferred to the defendant to be held on trust for the plaintiff. It is the duty of the plaintiff to establish the claim on the balance of probabilities and there is no duty imposed on the defendant to disprove the plaintiff's claim. The defendant is the registered owner of the said land absolutely and the title is indefeasible unless it falls under any of the exceptions as laid down in sub-s (2) of s 340 of the NLC which is not the case in the instant case.

[30] On the totality of the evidence this court finds that the plaintiff has failed to establish her claim on the balance of probabilities as required by law. On the other hand, even assuming that the plaintiff had produced sufficient evidence to support her claim, which is not the case and where this court is not satisfied, this court finds that the defendant had sufficiently rebutted the plaintiff's case and the plaintiff's claim is wholly untenable. Be that as it may, even assuming once again that the defendant's evidence is not probable or

accepted or the evidence produced on behalf of both plaintiff and the defendant are equally not probable, the onus is still on the plaintiff to establish its case. Therefore, this court finds that the plaintiff has failed to establish the claim against the defendant on the balance of probabilities. Accordingly, the plaintiff's claim ought to be dismissed.

[31] This court has every sympathy for the plaintiff but unfortunately, this court has to administer the law and justice in accordance with the facts and the evidence produced before this court. The plaintiff cannot expect this court to stretch the facts out of sympathy just to suit the plaintiff's case as the defendant also expects justice from this court as much as the plaintiff.

[32] In accordance with the rules of reasons and justice, this court finds the plaintiff is not entitled to the relief which is limited to prayer (a) and consequently (b), (c) and (d) and the plaintiff's claim is dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum